with the clear and earnest disapproval of the courts". *People* v. *Marxhausen, supra,* 567; see *contra, Ferguson* v. *Josey* (1902) 70 Ark. 94, 66 S. W. 345.

STATUTE OF FRAUDS—PART PERFORMANCE—VENDEE'S DONEE IN POSSESSION.—A orally agreed to purchase a dwelling house from B, her nephew, for the purpose of presenting it to C, her niece. At a family party A announced the gift. C went into possession with the consent of A and B, who had incurred considerable expense in regard to the property and title and was selling for less than he otherwise would have, because of his desire to benefit C. A died before anything more was done, and her executors repudiated the contract, pleading that it was not in writing. *Held,* the vendor could have specific performance. *Hohler* v. *Aston* [1920] 2 Ch. 420, 41 Can. L. T. 147.

Where the vendee or lessee enters into possession with the consent of the vendor or lessor, this is such part performance in most jurisdictions as to take the case out of the Statute of Frauds in favor of the vendor or lessor. 1 Ames, *Cases in Equity Jurisdiction* (1904) 279, n. 1, 280, n. 1; Browne, *Statute of Frauds* (5th ed. 1895) § 467. In some jurisdictions possession must be supplemented either by payment of the whole or part of the purchase price, or by improvements, to take the case out of the statute. 1 Ames, *op. cit.,* 287, n. 1. If the vendee's agent goes into possession, the case is equally without the statute. See *Moulton* v. *Harris* (1892) 94 Cal. 420, 421, 29 Pac. 706; *Ala. Cent. R. R.* v. *Long* (1909) 158 Ala. 301, 48 So. 363 (*semble*). The extension of this doctrine to the vendee's donee seems reasonable, especially where the very object of the oral agreement was that the donee should get the property. Assuming the liability of the vendee's estate to the vendor, an interesting question arises whether the gift of the house to the donee was complete so as to entitle her to retain it as against the estate. Equity protects a parole gift of land if accompanied by possession and improvements by the donee. See *Seavey* v. *Drake* (1882) 62 N. H. 393; Browne, *op. cit.,* § 467. The fact that the vendor was selling at a smaller price and had gone to considerable expense in regard to the property because of his interest in the donee ought to inure to the benefit of the donee, so as to put her in the same position as a donee in possession who has made improvements, and hence is entitled to equitable relief.

SUBROGATION—JOINT TORT-FEASORS.—One D. sued the plaintiff city and the defendant E. jointly for injuries resulting from the fact that the defendant E. ran a leader pipe under the sidewalk, causing water to back up thereon and freeze. The defendant E. was insured in the defendant casualty company, which secured an appeal bond from the defendant surety company. The judgment being affirmed, the surety paid D. The city seeks to restrain the surety company from collecting the amount of the judgment paid by it. *Held,* the city must pay one-half of the judgment to the defendant surety company. *City of White Plains* v. *Ellis et al.* (Sup. Ct. Sp. Term, 1920) 113 Misc. 5, 184 N. Y. Supp. 444.

The broad rule was early announced that where one of two or more persons liable *ex delicto* pays the judgment, he cannot sue the other for contribution. *Merryweather* v. *Nixan* (1799) 8 T. R. 186. This has been followed in all jurisdictions with the possible exception of one. See *Palmer* v. *Wick Steam Shipping Co.* (Scot. 1894) 6 Reports 245, 248. Where, however, the action is predicated on negligence, contribution is allowed. *Nickerson* v. *Wheeler* (1875) 118 Mass. 295; *contra, Andrews* v. *Murray* (N. Y. 1861) 33 Barb. 354. The New York Courts, desiring to limit their harsh rule, have said that where a surety for one of several joint tort-feasors pays the judgment, the surety is not in the same position

as his principal, but is subrogated to the rights of the plaintiff. *Kolb* v. *National Surety Co.* (1903) 176 N. Y. 233, 68 N. E. 247. The *Kolb* case is based on the reasoning that the doctrine of contribution being an equitable one, it will not be invoked on behalf of a tort-feasor since he does not come into court with clean hands. But this objection does not apply to a surety who pays the judgment. The court in the principal case, however, in following the *Kolb* case, failed completely to notice that the plaintiff city and defendant E. are not in *pari delicto*. The city's liability arises from the absolute duty imposed by N. Y. Cons. Laws (1909) c. 30, § 74. It is well settled, that although a municipality is primarily liable to persons injured on the highway, the ultimate liability which rests on the person causing the injury may be enforced in an action by the city to recover the amount paid by it under the judgment. *Robbins* v. *Chicago City* (1866) 4 Wall. 657; *City of Rochester* v. *Montgomery* (1878) 72 N. Y. 65. It is submitted that, in order to prevent circuity of action, the city should not have been compelled to pay any part of the judgment, all the parties being before the court.

SURETYSHIP—SUBROGATION—PRIORITIES—The National Surety Company, surety to the United States Government to the extent of $3,150 on a $13,000 debt, paid the full amount of its liability upon the bankruptcy of the debtor. The government claimed priority over all other creditors and the Surety Company claimed to share *pro rata* with the government under a statute giving a surety to the United States the same priority secured to the United States. *Held,* the Surety Company could not enjoy this priority until the whole debt had been satisfied. *United States* v. *National Surety Co.* (1920) 41 Sup. Ct. 29.

That a surety who pays his principal's debt is entitled to the same priorities which the creditor had is well settled. *Lidderdale's Executors* v. *Executor of Robinson* (1827) 25 U. S. 594; *Schoolfield's Adm'r* v. *Rudd* (1848) 48 Ky. 291 Accordingly, where the government is the creditor, the surety, upon payment, acquires the government's priority over general creditors, whether he is surety to the state, or the national organization. *Richeson* v. *Crawford* (1879) 94 Ill. 165 (state); *Hunter* v. *United States* (1831) 5 Peters 173, 182; *Churchill* v. *Churchill* (1888) 39 Ch. D. 174; (1913) COLUMBIA LAW REV. 757 (national government). The common law has been codified in U. S. Comp. Stat. (1916) § 6374, providing that a "surety . . . shall have the like priority . . . as is secured to the United States". This has been held, on the ground of public policy, not to include recognizances in criminal cases. *United States* v. *Ryder* (1884) 110 U. S. 729, 4 Sup. Ct. 196. Subrogation arises, however, only where a creditor's claim has been paid in full. *Peoples* v. *Peoples Bros.* (D. C. 1918) 254 Fed. 489; Stearns, *Suretyship* (2nd ed. 1915) 430. This is true even though the surety is liable only for part of the debt and has paid that part. *U. S. Fidelity etc. Co.* v. *Union Bank & Trust Co.* (C. C. A. 1915) 228 Fed. 448, 455; *National Bank of Commerce* v. *Rockefeller* (C. C. A. 1909) 174 Fed. 22. Sheldon, *Subrogation* (2d ed. 1893) § 127. Where a debt which is owed to the government is completely satisfied by a surety, but the government has an entirely independent claim on the same debtor, an interesting question arises, whether the surety can be subrogated to the government's priority, and thus come in *pari passu* with the government for the debtor's remaining assets. This would be carrying out the policy effectuated in the rule allowing a surety all the priorities possessed by the creditor, a rule evolved to encourage sureties to participate in commercial transactions. On the other hand, the policy behind the statutes giving the government priority in the collection of its debts undoubtedly was that the community should always be the last to lose. Granting a surety a priority equal to that of the government would be inconsistent